Supreme Court, U.S.
FILED

01 -19 JUN 28 2001

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

F/V QUALITY ONE, IN REM;
NUNYA, INC. IN PERSONAM,
Petitioners,

v.

GOWEN, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RUSSELL C. THARP, JR.*
1 SOUTHWESTERN PLAZA
GLEN FALLS, N.Y. 12801
(518) 798-1785

WILLIAM H. WELTE
WELTE & WELTE, P.A.
13 WOOD STREET
CAMDEN, ME 04843
(207) 236-7786

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

46 pp

QUESTION PRESENTED

Is a fishing permit issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801 (1994 & Supp. III 1997), *et seq.* an appurtenance of a fishing vessel and therefore subject to a maritime lien.

PARTIES TO THE PROCEEDINGS

Petitioners

Nunya, Inc. and the F/V QUALITY ONE, O.N. 909122

Respondent

Gowen, Inc.

Other Parties

Resource Trading Company

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Maritime Liens 2

B. National Marine Fisheries Service Fishing Permits 3

C. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 5

1. The Question Presented is Important . . . 5

2. The Decision of the Court of Appeals is Erroneous 8

CONCLUSION 9

APPENDIX

Appendix A
Court of Appeals Opinion 1a

Appendix B
District Court Memorandum of Decision and
Order, 6/14/00 . . . . . 16a

TABLE OF AUTHORITIES

Cases **Page**

American Pelagic Fishing Company , L.L.P. v. The United States, 49 Fed. Cl. 36 (2001) . . . 9

American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co., 115 Fed. 669 (1st Cir. 1902), rehearing denied 116 Fed. 857 (1st Cir. 1902) . . 3

Bank of America, NT & SA v. Pengwin, 175 F.3d 1109, 1119 (9th Cir. 1999) 6

Conti v. United States, 48 Fed. Cl. 532 (2001) 3

Panama Railroad Co, v. Johnson, 264 U.S. 375 (1924) 7

Piedmont & George's Creek Co. v. Seaboard Fisheries Co., 41 S. Ct. 1, 4 (1920) 7

Racal Survey USA, Inc. v. M/V COUNT FLEET, 231 F.3d 183 (5th Cir. 2000) 6, 7

Tarstar Shipping Co., v. Century Shipline, Ltd., 597 F.2d 837, 839-40 (2nd Cir. 1979) 3

The Joseph Warner, 32 F. Supp. 532 (D. Mass., 1939) 2

Turner v. U.S.,
27 F. 2d 134, 136 (2nd Cir. 1928) 2

United States v. Freights of the Mount Shasta,
274 U.S. 466, 47 S. Ct. 666 (1927) 3

Walsh v. Tadlock,
104 F. 2d 131 (9th Cir. 1939). 7

Statutes and Rules

16 U.S.C. § 51(a)(1)(2000) 4
16 U.S.C. § 1853(b)(2000) 4
28 U.S.C. 1292(a)(3) 5
Supplemental Rules for Certain Admiralty and Maritime
Claims, Rule C (3) 2, 4, 8

Other Authorities

2 Benedict on Admiralty (7th ed. 2000) 2
21-3 Schoenbaum,
Admiralty & Maritime Law, (1994) 2

Nunya, Inc. ("Nunya") and F/V QUALITY ONE respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 2001 WL 293208 (1st Cir. 2001), and is reproduced in App. A at 1a-15a. The opinion and order of the United States District Court for the District of Maine is reported at 2000 A.M.C. 2225 (D. Me. 2000) and is reproduced in App. B at 16a-30a.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on March 30, 2001 and judgment issued on March 30, 2001.

STATEMENT OF THE CASE

This case involves an *in rem* seizure of a fishing vessel to enforce a maritime lien for wharfage and services provided by a shipyard. A Marshal's Sale was conducted following the allowance of the plaintiff's Motion for Interlocutory Sale. The Motion for Confirmation of the Sale was contested, the vessel owner claiming that its fishing permits and history were not appurtenances to the vessel or maritime property otherwise subject to the arrest or maritime lien. The District Court held an evidentiary hearing on the motion to confirm and, in a written decision, confirmed the sale, including the sale of the permits on the grounds that they were vessel appurtenances.

The vessel owner timely appealed to the First Circuit Court of Appeals. After hearing, the panel characterized the issue raised as one of first impression and upheld the decision of the District Court.

A. Maritime Liens

A party's *in rem* claim against a vessel depends upon the existence of a maritime lien in which the warrant for arrest is issued to foreclose and enforce the lien. Schoenbaum, *Admiralty & Maritime Law,* Sec. 21-3 at 482, 483. That treatise goes on to point out that "Although the property arrested is usually a vessel, the warrant can be directed against any property that may be subject to a maritime lien, including cargo and freight." Id. at 483. The supplemental Rules for Certain Admiralty and Maritime Claims contain specific provisions for seizing intangible property as well as tangible property with differing procedures based upon the distinction between them. Rule C (3), Supplemental Rules for Certain Admiralty and Maritime Claims. The issue presented here is whether a fishing permit constitutes such property.

The term 'vessel' includes its apparel and appurtenances.") 2 *Benedict on Admiralty* § 32, at 3-3 (7th ed. 2000). Vessel "appurtenances" include the tackle, apparel, furniture, machinery and sails," *Turner v. U.S.*, 27 F. 2d 134, 136 (2nd Cir. 1928), all tangible objects. In *The Joseph Warner*, 32 F. Supp. 532 (D. Mass., 1939), the Court, in discussing fishing vessel appurtenances, went so far as to apply the real estate "fixture" analogy. It held that where an owner placed equipment that contributed to the efficiency of its functioning, aboard his ship the owner could not, as against a prior mortgagee of the vessel, remove the equipment even though removal without material damage to the vessel was feasible. The case law is thus clear that a maritime lien

may attach to a tangible object that is appurtenant to a vessel, where the object contributes to the vessel's functioning.

A maritime lien may also be enforced upon subfreights, which are intangible, *United States v. Freights of the Mount Shasta*, 274 U.S. 466, 47 S. Ct. 666 (1927), *American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co.*, 115 Fed. 669 (1st Cir. 1902), rehearing denied 116 Fed. 857 (1st Cir. 1902), These lien claims represent a unique circumstance[1] and do not rely upon any fiction that freight is an appurtenance of the vessel ("By the general logic of the law a debt may be treated as a res as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's, capable of being attached and appropriated by the law to the creditor's duties." 274 U.S. at 469) Process in those cases are directed against the intangible itself, not the "the vessel, her engines, equipment, and appurtenances, including" [its freight earned.] The freights constitute an "independent res." *Tarstar Shipping Co., v. Century Shipline, Ltd.*, 597 F.2d 837, 839-40 (2nd Cir. 1979). This is consistent with the Supplemental Rules, cited above, which concern seizure of intangibles. The Petitioners submit that there are no decisions holding that a maritime lien attaches to an intangible based upon the appurtenance theory.

B. National Marine Fisheries Service Fishing Permits

Fishery conservation and management in the United States is complex and pervasive and fisheries are subject to

---

[1] "In rem proceedings against intangible property are almost always to enforce a lien aganist subjfreights for the payment of hire due under a charter party." FN 14, Schoenbaum, supra. at 483.

many regulatory statutes. *Conti v. United States*, 48 Fed. Cl. 532 (2001). However,

> The primary regulatory statute is the Magnuson-Stevens Act, 16 U.S.C. § 1801 et seq., ("Act") which gives the Secretary of Commerce the power to regulate fisheries. The Act aims to prevent overfishing of fish stock while obtaining the maximum yield for each fishery. See 16 U.S.C. § 51(a)(1)(2000). *Conti*, 48 Fed. Cl. at 532.

Quotas, limited access systems, and permit regulations can be utilized to carry out the purpose of the legislation. See 16 U.S.C. § 1853(b)(2000). This whole statutory framework was characterized by the First Circuit as "too complex to summarize."(App.9 9a)

C. The Proceedings Below

This litigation was brought in the District Court for the District of Maine under the Court's general admiralty jurisdiction. See 28 USC §1333. U.S. Const. Art. 111, §2. It began with the usual filing of a Verified Complaint accompanied by a Motion to Arrest the F/V QUALITY ONE. The subsequently issued *In Rem* Warrant of Arrest did not refer to the permits or the vessel's fishing history. Upon the vessel's arrest, the plaintiff sought an interlocutory sale, in which it specifically requested that the permits and history be sold with the vessel *in rem* as appurtenances thereof. A Notice of Sale published pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims alerted prospective bidders that the permits would be included in the sale "to extent provided by law." Following the Marshal's sale, the plaintiff sought to have it confirmed and the vessel

owner objected to the Motion to Confirm Sale on the grounds that the permits were without the scope of the Warrant of Arrest and, therefore, not in *custodia legis*. Petitioner also argued that the permits were not subject to a maritime lien as they were licenses of the owner as opposed to being appurtenances of the vessel.

After an evidentiary hearing, the District Court issued a written decision confirming sale of the vessel, with permits, having determined that they were appurtenances subject to arrest. *Gowen, Inc. v. F/V Quality One*, 2000 A.M.C. 2225, 2229, 2233 (D. Me. 2000). In its decision the lower Court discussed "appurtenance theory" and found specifically that ". . . a fishing permit is an ***intangible*** right to fish, whereas typical appurtenances, like fishing nets and radar systems are tangible property." (App. 23a) Thereafter, by notice of appeal docketed in the District Court on August 11, 2000, Petitioners sought interlocutory appeal to which they were entitled pursuant to 28 U.S.C. 1292(a)(3) from the District Court's decision. See Fed.R. App. P. 4(a)(1). The First Circuit, in upholding the District Court, concluded that there was no general objection to treating an intangible as an appurtenance. (App 8a).

REASONS FOR GRANTING THE WRIT

1. The Question Presented is Important

Both the United States District Court for the District of Maine and First Circuit Court of Appeals recognized and proclaimed the question presented to be one of first impression ("This case involves a question of first impression as to the scope of maritime liens." App. 2a; "Neither party has cited, nor has the Court uncovered any authority that directly addresses whether or not a maritime lien reaches

commercial fishing vessel permits . . ." App. 20a) The question raised here is important due to

> . . . the relatively recent development of limited access fisheries in which new permits are unavailable and existing permits are encumbered by ever-increasing limitations. (App.20a-21a).

Other Courts are having to deal with the issue, either head-on or indirectly. In *Bank of America, NT & SA v. Pengwin*, 175 F.3d 1109, 1119 (9th Cir. 1999), the issue arose but was not litigated. (App. 11a). The First Circuit's decision in this matter apparently has already served as the basis for a summary affirmance in the matter of *Patenaude v. F/V Miss Jenna et. al.*, Civil Action No. 98-12351, a case currently pending in the United States District Court for the District of Massachusetts.

The decisions in this matter render current maritime lien law uncertain with respect to the definition of "appurtenances." They also directly conflict with the provisions of 16 U.S.C. § 1855(h), the Magnusson Act, and interferes with the National Marine Fisheries Service's authority over the permits it issues pursuant to that legislation. For instance, the decision of the Court of Appeals makes no mention of how the legislation and the general maritime law will interact once the "exclusive registry" mandated by the legislation is established. (App. 14a) Finally, the decision of the Court of Appeals will promote entirely illogical results and inconsistent decisions of lower courts when sought to be applied. This is especially so in light of recent caselaw holding that "Maritime liens are *stricti juris* and will not be extended by construction, analogy, or inference," *Racal Survey USA, Inc. v. M/V COUNT FLEET*, 231 F.3d 183 (5th

Cir. 2000) citing *Piedmont & George's Creek Co. v. Seaboard Fisheries Co.*, 41 S. Ct. 1, 4 (1920). Given the state of the law regarding maritime liens on intangible "appurtenances," petitioner submits that such an extension is what has transpired with respect to the recognition of maritime liens on fishing permits.

Contrary to the view of the First Circuit (App. 9a), there are overriding objections to treating permits as subject to maritime liens. First, the doctrine of uniformity in maritime law, *Panama Railroad Co, v. Johnson*, 264 U.S. 375 (1924), is compromised because fishing permits are issued on a regional basis and/or are species-specific. (App. 10a) See generally *Conti v. United States*, 48 Fed. Cl. 532 (2001). A particular permit may not be vital to the vessel's mission in differing geographical locales or if the vessel fishes for different species. The permit could thus be an appurtenance in one location, but not the other.

Another objection is that under the authority of the First Circuit's decision, the permits are subject to arrest as intangible property. Service of process upon the National Marine Fisheries Service would presumptively bring them into *custodia legis*. Consequently, the vessel would be unable to fish or operate, even if it had not itself been seized.

Another incongruity which results under the law of the case is what happens when a fishing vessel is lost. Under traditional maritime lien law, the loss of the *res* extinguishes the lien. *Walsh v. Tadlock*, 104 F. 2d 131 (9th Cir. 1939). If the permit is truly appurtenant to the *res* that is lost, is the lien upon it extinguished also? If so, the result is entirely inconsistent with the Magnusson Act which makes clear that the permit can be transferred to replace a vessel sold or lost. 50 C.F.R. § 648.4(a)(1)(i)(D). And, since maritime liens are

silent (App. 10a), liens claimed on permits would follow the permit even if transferred pursuant to the provisions of the legislation.

2. The Decision Of The Court Of Appeals Is Erroneous

The First Circuit upheld a lower District Court which found specifically that " the QUALITY ONE's fishing permits are appurtenances subject to maritime liens." (App.24a). As stated above, Petitioners have been unable to locate any decisions wherein a maritime lien was held to exist over an intangible, appurtenance. The First Circuit failed to appreciate the fact that the subfreight cases were not decided based upon the appurtenance theory relied upon by the District Court. Rather, those cases found freights to be an independent *res*. The Appeals Court also ignored the fact that the Supplemental Rules For Certain Admiralty and Maritime Claims recognize the distinction between tangibles and intangibles and that Gowen did not adhere to the procedural requirements for seizing an "intangible aboard a vessel."

The Court of Appeals upheld Gowen's argument that the appurtenance theory was appropriate because the permits were assigned to a vessel and followed it. However, permits have been held to be "closely analogous to a revocable license or privilege, and the Magnuson-Stevens Act disclaims any grant of a property interest" in them. *Conti*, 48 Fed. Cl. at 538; *see also* 16 U.S.C. § 1853(d)(3)(D) (Supp. III 1997). Thus, there is a dichotomy in the law which this court should address. Are these fishing permits licenses or evidence of privilege, or do they constitute a property interest sufficient to become "appurtenant" to something physical, i.e., the vessel itself. Are they personal property of the vessel owner and more akin to "a desk in a steamship office" (App. 7a) or to

"typical appurtenances, like fishing nets and radar systems are intangible property." (App. 23a) The *Conti* decision supports petitioner's argument below that the permits are revocable licenses personal to the vessel owner. Cf., *American Pelagic Fishing Company , L.L.P. v. The United States*, 49 Fed. Cl. 36 (2001)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Russell C. Tharp, Jr.
1 Southwestern Plaza
Glens Falls, N.Y. 12801
518-798-1785
Counsel of Record

William H. Welte
Welte & Welte, P.A.
13 Wood Street
Camden, ME 04843
(207) 236-7786

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Decided March 30, 2001]

No. 00-1898

GOWEN, INC.,
Plaintiff, Appellee,

v.

F/V QUALITY ONE, IN REM; NUNYA, INC., IN PERSONAM;
Defendants, Appellants.

RESOURCE TRADING COMPANY,
Claimant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, U.S. District Judge]

Court of Appeals Opinion - 3/30/01

Before

Boudin, Circuit Judge,

Bownes, Senior Circuit Judge,

and Lynch, Circuit Judge.

William H. Welte with whom Welte & Welte, P.A. was on brief for appellants.

Michael Kaplan with whom Preti, Flaherty, Beliveau, Pachios & Haley, LLC was on brief for plaintiff.

BOUDIN, Circuit Judge. This case involves a question of first impression as to the scope of maritime liens. Gowen, Inc., brought the action in December 1999 in federal district court against the vessel F/V Quality One and her owner, Nunya, Inc. Gowen sought to recover debts owed for wharfage and repair, and sought relief in rem against the vessel and in personam against the owner. Federal Maritime Lien Act, 46 U.S.C. §§ 3141-43 (1994). The amount sought, with interest through November 23, 1999, was just under $12,000, plus unspecified costs of collection and attorney's fees. The vessel was arrested pursuant to a warrant commanding the seizure of "her equipment, engines, and appurtenances."

After Nunya failed to answer Gowen's complaint, Gowen secured an entry of default and then a default judgment establishing liability. Fed. R. Civ. P. 55(a), (b). Upon entry of the default judgment, Gowen promptly moved for sale of the vessel, including specifically her fishing

permits and history, which Gowen's motion argued were appurtenances of the vessel. No opposition was filed. On February 29, 2000, the court ordered a public sale of the vessel, including "any valid fishing permits and history to the extent permitted by applicable law." The permits, as more fully explained below, are federal permits allowing restricted use of the vessel for the fishing of specific species. See, e.g., 50 C.F.R. § 660.336(b) (2000); Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370, 373 & n.1 (D.D.C. 1991).[1]

After local advertising the vessel was sold at auction on March 15, 2000, by representatives of the United States Marshals Service. Seven or eight bidders attended, as did the captain of the vessel. Prior to the bidding, the captain told those present that the sale was being challenged legally and that the permits would not be transferred with the vessel. Only two bids were then made: one by Gowen for $ 16,000, and the other by Andrew Todd for $17,000. Todd's bid was accepted. Under the terms of the auction, Todd paid the $17,000 sale price that same day.

Gowen moved on March 27, 2000, for confirmation of the sale, and for the first time counsel for the vessel and owner appeared and opposed the motion. The opposition

---

[1]The fishing or catch history is a record of fish caught by the vessel over time (usually measured in yearly increments). It is used to determine whether the vessel qualifies for a permit and what the vessel's permit allows. Consistent with the practice of the district court and the parties, we sometimes refer to the permits alone when both the permits and the corresponding fishing history are meant.

disputed inter alia the inclusion of the permits and the fairness of the price. The district court then held an evidentiary hearing, in which it heard testimony from five witnesses. The court later received briefs from both sides. On June 14, 2000, the court issued a decision upholding the sale and ruling that the permits and history were included as appurtenances. Gowen, Inc. v. F/V Quality One, 2000 AMC 2225, 2229, 2233 (D. Me. 2000). Thereafter, the Marshal provided a bill of sale to Todd.

1. Nunya and the F/V Quality One have now appealed from the confirmation of sale and the decision that the sale includes the permits and history. Although interlocutory (the proceeds have not yet been divided), the confirmation order is appealable. 28 U.S.C. § 1292(a)(3) (1994). Nevertheless, Gowen has argued that the appeal should be dismissed, for mootness or lack of jurisdiction, because the appellants allowed the sale to be completed without seeking a stay. This means, says Gowen, that no effective relief is now possible since Todd owns the vessel and permits and Todd is not even a party to the case.

The problem raised by Gowen is common enough in a number of different contexts. See, e.g., Oakville Dev. Corp. v. F.D.I.C., 986 F.2d 611, 613 (1st Cir. 1993) (mortgage foreclosure sale); Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.), 895 F.2d 845, 847-48 (1st Cir. 1990) (bankruptcy). Here, it is sufficient to defeat any claim of mootness that a reasonable chance of effective relief would remain if we were persuaded to reverse the district court. For example, a ruling that the fishing permits were not transferred would be possible. Only if it were indisputable that no form of relief could be provided would a mootness claim lie. Pine

Tree Med. Assocs. v. Sec'y of Health & Human Servs., 127 F.3d 118, 121 (1st Cir. 1997).

Obviously, any relief that nullified the sale or stripped out the permits could raise issues of fairness and reliance, and there is an interest in making court-ordered auctions viable. See Munro Drydock, Inc. v. M/V Heron, 585 F.2d 13, 14 (1st Cir. 1978). But in the ordinary case, these are arguments against relief or particular types of relief--not proof that relief is impossible. It is only in an extreme case (e.g., a completed complex reorganization, cf. Rochman v. Northeast Utils. Serv. Group (In re Pub. Serv. Co. of N.H.), 963 F.2d 469, 472-76 (1st Cir.), cert. denied, 506 U.S. 908, 121 L. Ed. 2d 226, 113 S. Ct. 304 (1992)), that the failure to seek a stay might be deemed fatal at the outset.

Alternatively, Gowen says that appellants waived their objections, or that laches applies, because they did not oppose the default, default judgment, or motion for sale, and did not seek a stay of the confirmation order. No obvious reason exists why either default (entry or judgment) should bar an objection to the adequacy of the auction price; the fairness of the sales price could hardly be an issue prior to the sale. By analogy, failure to contest a default judgment for an unliquidated sum does not automatically bar a dispute as to damages. See Fed. R. Civ. P. 55(b)(2); cf. Sony Corp. v. Elm State Elecs., Inc., 800 F.2d 317, 321 (2d Cir. 1986).

On the other hand, the failure to object in advance to inclusion of the permits could be deemed fatal to an appeal on that issue. This is not because of the default judgment; the complaint did not specifically mention the permits nor does a default judgment automatically preclude all challenges, in

subsequent stages of the same case, to the legal premises of the complaint.[2] It is because after the default but before the sale Nunya knew from the terms of the motion that Gowen sought to include the permits in the sale and did nothing to object to this inclusion in court prior to the sale.

Although the complaint did not request anything more specific than the arrest, attachment, and sale of the F/V Quality One and the attachment and sale of other unspecified property of Nunya, the duly served motion for an order of sale explicitly sought to include the permits and history as "appurtenances" to be sold. No objection was filed on behalf of appellants. Thereafter, the court's order specifically designated the permits and history as items to be sold at the auction to the extent legally permitted; although there were more than two weeks between the order and the sale, again no objection was filed by appellants.

It seems to us that once appellants knew that the order of sale was intended to sell the fishing permits and history, they had an obligation to make a timely objection to the district court. Cf. Reilly v. United States, 863 F.2d 149, 160-61 (1st Cir. 1988). Under the District of Maine's local rules, objections to the motion for an order of sale were waived if they were not filed within ten days after the filing of the

---

[2]The default judgment is conclusive as to facts but does not always defeat later legal objections. Bonilla v. Trebol Motors Corp., 150 F.3d 77, 80 (1st Cir. 1998) (defaulted party able to argue failure to state a claim), cert. denied, 526 U.S. 1098 (1999); Dierschke v. O'Cheskey (In re Dierschke), 975 F.2d 181, 185 (5th Cir. 1992) (entertaining a defaulted party's argument that relief was beyond that requested in the complaint).

contested motion, D. Me. R. 7(b) (2000) (the period was recently increased to 21 days). Appellants did not file any objection in the more than three weeks between Gowen's motion and the date when it was granted.

Nonetheless, although the obligation to make timely objections is worth stressing for the benefit of future litigants, we do not rely upon it in this case. When the district court ordered that the sale include the permits, it said that this inclusion was "to the extent permitted by applicable law," arguably reserving the issue for later disposition. And the district court decided on the merits the issue of whether the permits were properly included. Under these circumstances, we decline to decide the dispute based solely on waiver or laches.

2. Under maritime law, a maritime lien against the vessel and its appurtenances arises for certain liabilities, including wharfage and repairs, and the vessel can be arrested and sold to satisfy such liens. See generally Gilmore & Black, The Law of Admiralty ch. IX (2d ed. 1975). It was on that doctrinal premise that the sale in this case took place. If the permits were appurtenances, they were subject to the lien and passed with the sale of the vessel; if not, they were merely personal property of the owner, like a desk in a steamship company office. 2 Benedict on Admiralty § 32, at 3-3 (7th ed. 2000) ("The term 'vessel' includes its apparel and appurtenances.").[3]

---

[3]Here, Gowen sought an in personam judgment against Nunya and might eventually have levied on its non-appurtenant property, but a maritime lien is enforced by different procedures and governed by different substantive rules. See Gilmore & Black,

Traditionally, a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel and is "essential to the vessel's navigation, operation, or mission." Gonzalez v. M/V Destiny Panama, 102 F. Supp. 2d 1352, 1356 (S.D. Fla. 2000); see also United States v. F/V Sylvester F. Whalen, 217 F. Supp. 916, 917 (D. Me. 1963). Although a vessel's fishing permits generally must be kept "on board," 50 C.F.R. § 648.4(l), the rights themselves are what matter, and they are intangible. The question, not often mooted, is whether a maritime lien applies to intangibles that play a role similar to the vessel's equipment.

There is no general objection to treating an intangible as an appurtenance. On the contrary, freight charges due on account of a vessel's carriage of cargo are subject to maritime liens against the vessel. United States v. Freights of the Mount Shasta, 274 U.S. 466, 469-70, 71 L. Ed. 1156, 47 S. Ct. 666 (1927) (Holmes, J.); 29 Moore's Federal Practice § 705.01[6][d], at 705-21 (Coquillette et al. eds., 3d ed. 2000). Appellants point out that the majority view is that insurance proceeds due on cargo loss or damage are not subject to maritime liens.[4] However, the reasons for this do not turn on the intangible character of the proceeds but on

---

supra, §§ 9-1, 9-2, 9-19.

[4]See Gilmore & Black, supra, § 9-19, at 622 n.80 (citing conflicting cases). Compare Farland v. T & T Fishing Corp., 626 F. Supp. 1136, 1140-41 (D.R.I.), vacated on other grounds, 808 F.2d 1513 (1st Cir. 1986), and A.M. Bright Grocery Co. v. Lindsey, 225 F. 257, 260-61 (S.D. Ala. 1915), with The Conveyor, 147 F. 586, 592-93 (D. Ind. 1906).

history and on conceptual concerns peculiar to insurance. See note 4.

"The determination [whether something is an appurtenance] is commonly made on a case-by-case basis without great consistency of results." 1 Schoenbaum, Admiralty and Maritime Law § 9-1, at 489 (2d ed. 1994). There being no authoritative answer as to how fishing permits should be classed, we must ask whether treating such permits as subject to maritime liens advances the objectives for which such liens were created and, if so, whether there are overriding objections to the contrary. A familiar purpose of such liens is to make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic supplies or services needed for its operation.[5]

Because of declining fishing stocks, federal law now elaborately regulates catches for many types of fish through a network of statutory provisions, regulations, and agreements too complicated to summarize. See, e.g., Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-83 (1994); 50 C.F.R. ch. VI (1999). In practical terms, the "vessel permits" at issue in this case reflect rights to fish for certain species for a certain number of days each year. See 50 C.F.R. pt. 648. For present purposes, what matters is that vessels like the F/V Quality One are valuable

---

[5]Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan, 890 F. Supp. 552, 562 (N.D. Miss. 1995); Bavely v. Wandstrat (In re Harbour Lights Marina, Inc.), 146 B.R. 963, 971 (Bankr. S.D. Ohio 1992), aff'd, 153 B.R. 781 (S.D. Ohio 1993); 29 Moore's Federal Practice, supra, § 705.01[1], at 705-7.

significantly, and sometimes almost entirely, because of their permits.

Testimony during the district court hearing made clear that the F/V Quality One's permits contributed substantially to the vessel's value, although there was disagreement as to what the vessel was worth standing alone and how much more the permits contributed. Documents indicated that the permits included a multispecies permit (for certain northeastern species listed in the regulations) and several other permits for individual species. Neither at the hearing nor on appeal has either side distinguished among the permits.

Thus, not only the market value but the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation equipment. Maritime liens underpin the extension of credit to fishermen, and this mechanism for ready credit would be impaired by excluding from the lien the permits that allow vessels to carry on their accustomed fishing activities. Thus, in the large, fishermen seeking repairs and supplies on credit are likely to benefit from treating a vessel's permits as appurtenances.

The benefits should not be overstated. Maritime liens are mostly "secret," because (ship mortgages aside) there is no registry system for such liens. 2 Benedict on Admiralty, supra, § 24, at 2-16; Gilmore & Black, supra, at 588. Furthermore, the general rule with maritime liens is that, among liens of "equal rank," later liens have priority. 2 Benedict on Admiralty, supra, § 51, at 4-4. No one offering credit for supplies or repairs can be certain just how many higher-priority creditors will be standing in line when

collection is sought. But presumably common knowledge may supply the equivalent of a credit rating for a fisherman based for years in, or regularly visiting, the same community.

From the standpoint of policy, no obvious arguments exist against treating the permits as subject to lien. We have assumed, as appellants assert, that the permits could in some circumstances be severed from the vessel upon its sale and retained by its old owner. But courts have repeatedly upheld maritime liens upon "severable" equipment, including, surprisingly enough, equipment merely leased to the owner. Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan, 890 F. Supp. 552, 561 (N.D. Miss. 1995) ("components of a vessel, even though readily removable," may be appurtenances); F/V Sylvester F. Whalen, 217 F. Supp. at 917 (leased fathometer and radar equipment); 2 Benedict on Admiralty, supra, § 32, at 3-3 to 3-5; 1 Schoenbaum, supra, § 9-1, at 488-89.

Nor is there any indication that upholding the lien here would upset settled expectations. There is no evidence of any common understanding in the maritime world that permits are, or are not, subject to liens. Nor is there much precedent. The only circuit case on point assumed without discussion that permits were subject to liens, but the issue was not actively litigated. Bank of Am. v. Pengwin, 175 F.3d 1109, 1119 (9th Cir.), cert. denied, 528 U.S. 872 (1999). Here, as elsewhere with new issues, the case law probably has to form expectations rather than reflect them.

Appellants point out that Congress has recently provided by statute for the Secretary of Commerce to create a registry system for a large class of fishing permits,

Sustainable Fisheries Act, Pub. L. No. 104-297, § 110(d), 110 Stat. 3559, 3590-92 (1996) (codified at 16 U.S.C. § 1855(h) (Supp. II 1996)). The statutory provision in question, 16 U.S.C. § 1855(h), contains language that could be used to argue that the registry system will preempt any use of maritime liens against fishing permits:

> Such registration shall constitute the exclusive means of perfection of title to, and security interests in, such permits, except for Federal tax liens thereon . . . .

16 U.S.C. § 1855(h)(3) (Supp. II 1996) (emphasis added). Indeed, a subsequent subsection of the registry statute defines "security interest" to "include security interests, assignments, liens and other encumbrances of whatever kind." Id. § 1855(h)(4).

What appellants tellingly omit is the preceding sentence, which reads as follows:

> To be effective and perfected against any person except the transferor, its heirs and devisees, and persons having actual notice thereof, all security interests, and all sales and other transfers of [certain fishing] permits . . ., shall be registered in compliance with the regulations promulgated . . . .

Id. § 1855(h)(3) (emphasis added). Placement suggests that the claimed exclusivity, even if it applies to maritime liens, does not apply to the perfection of a security interest against the transferor of that interest--in this case, Nunya. Thus, we

need not resolve Gowen's claim that maritime liens are not encompassed within section 1855(h)'s definition of security interests, because (allegedly) "[a] maritime lien, so-called, is not a lien at all in the common law sense of the term," Gilmore & Black, supra, § 9-1, at 586.

More important, the registration system is not yet established, because regulations to implement it are still not in force. Sometimes new legislation indicates how Congress would wish a problem to be solved absent the statute or its implementing regulations, Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994), but the statutory provisions that appellants cite do not do this. The legislation would create a different means of achieving a security interest in fishing permits; this tells us nothing about how Congress would wish the matter to be handled where no registry system yet exists.

Congress's provision for "transition" to the registry system, which appears as a note in the United States Code, is more illuminating. See Sustainable Fisheries Act, Pub. L. No. 104-297, § 110(e), 110 Stat. at 3592 (codified at 16 U.S.C. § 1855 note). Congress's transition provision states:

> Security interests on permits [within the ambit of the registry] that are effective and perfected by otherwise applicable law on the date of the final regulations implementing [the registry] shall remain effective and perfected if, within 120 days after such date, the secured party submits evidence satisfactory to the Secretary of Commerce and in compliance with such regulations of the perfection of such security.

Id. The transition provision indicates that Congress intended for security interests "effective and perfected by otherwise applicable law" to remain so at least until the establishment of the registry.[6]

3. Appellants argue at length that the auction price for the vessel was unfairly low with or without the permits. A district court should disallow a court-ordered sale where the price is grossly inadequate, "at least where the interests of creditors do not point in a different direction." Munro Drydock, Inc. v. M/V Heron, 585 F.2d 13, 14-16 (1st Cir. 1978). Necessarily, "[w]hat is grossly inadequate . . . is a judgment call which does not lend itself to firm guidelines, for the circumstances involved are so varied." 29 Moore's Federal Practice, supra, § 706.02[7][b], at 706-22 to -23. Here, the district court took evidence, analyzed the testimony, and concluded that the sale price was not grossly inadequate. The district court's judgment on such an issue would normally be reviewed under a deferential standard and, to the extent raw facts were involved, reversed only for clear error. United States v. Howard (In re Howard), 996 F.2d 1320, 1327-28 (1st Cir. 1993).

---

[6]Appellants cite to us a letter from an officer of the National Marine Fisheries Service that might be read to say that the statutory provisions preempt maritime liens even in the absence of the registry. Since Congress has "directly spoken" to this issue, any contrary agency interpretation cannot stand. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

The district court's discussion of the value issue, like the rest of its opinion, is cogent and persuasive. We have discussed the lien issue in detail because it is a legal question of first impression, although the core of our reasoning on this issue tracks that of the district court. However, the value issue is fact-specific, and we readily rely on the district court's reasoning and conclusions to find that the auction was fair and the price received not grossly inadequate.

Some might think that the value issue should not even be reached because the former captain's conduct went far to frustrate the possibility of a better sale price. Cf. Campaniello Imports, Ltd. v. Saporiti Italia S.P.A., 117 F.3d 655, 662 (2d Cir. 1997) (general equitable principle that a claimant may not seek relief from a situation for which the claimant is to blame). However, so far as it was not obstreperous (it may have been in part), one might in the ordinary case defend the captain's conduct as giving fair notice to other bidders that the permit issue would be litigated; on the other hand, the failure to raise the issue in court before the auction somewhat compromises this argument. It is enough here that the district court's treatment of the captain's conduct seems to us reasonable.

This case has been well litigated on both sides. The issue is both novel and difficult. We affirm the judgment but direct that each side shall bear its own costs on the appeal.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Decided June 14, 2000]

Civil No. 99-371-P-C

GOWEN, INC.,
Plaintiff

v.

F/V QUALITY ONE,
Official No. 909122, her equipment,
Engines, and appurtenances,
In Rem

And

NUNYA, INC.,
In personam,
Defendants

GENE CARTER, District Judge.

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on Plaintiff's Motion for Order Confirming Sale ("the Motion") (Docket No. 18) following the auction of the fishing vessel QUALITY ONE, Official Number 909122.[1] Defendants oppose the Motion on the grounds that the auction did not realize sufficient value for the QUALITY ONE. The Court conducted an evidentiary hearing regarding the value of the vessel. For the reasons that follow, the Court will grant the Motion.

Plaintiff brought this action under 46 U.S.C. § 31341 *et. seq.* against the QUALITY ONE and its owner, Nunya, Inc., ("Nunya") to recover debts for wharfage services and repairs provided by Plaintiff. Verified Complaint (Docket No. 1). Subsequently, an order to arrest the QUALITY ONE was issued. Motion for Arrest of Vessel (Docket No. 2). When Nunya failed to answer, Plaintiff sought and obtained, by order of this Court, a default judgment against Nunya. Motion for Default Judgment (Docket No. 13). Simultaneously, the Court ordered the sale of the QUALITY ONE. Motion for Interlocutory Sale (Docket No. 12). A public auction was conducted, and Plaintiff now seeks an order to confirm the sale. Nunya has come forward to oppose the Motion, on the grounds that the auction failed to achieve a reasonable price

---

[1]The Verified Complaint (Docket No. 1) identifies the QUALITY ONE by Official Number 909122. But all subsequent filings by Plaintiff, and all filings by Defendant, refer to Official Number 919122. The Court believes, based on the photos of the QUALITY ONE, attached as unnumbered exhibits to Defendant's Opposition to Plaintiff's Motion to Confirm Sale (Docket No. 19), that the actual Official Number of the QUALITY ONE is 909122.

for the vessel. After briefing was completed, the Court conducted an evidentiary hearing. Both in its response to the Motion and in an additional filing made the day of the hearing, Defendant contends that the commercial fishing permits maintained by it for the QUALITY ONE are not subject to the Marshal's arrest of the vessel and will not transfer to the auction purchaser. Following the evidentiary hearing, the Court asked the parties to provide additional briefing with regard to the transferability of the fishing permits.

A public auction of the QUALITY ONE was held on March 15, 2000. The auction was advertised in the *Portland Press Herald* and the *Maine Sunday Telegram*. Plaintiff also distributed fliers advertising the auction at a commercial fishing trade show. Seven or eight bidders, including Plaintiff, signed in at the auction. Dale Doucette, employed by Nunya as the captain of the QUALITY ONE, attended the auction as well. Prior to the bidding, Mr. Doucette announced to all the bidders that the auction was being challenged legally and that the commercial fishing permits maintained for the QUALITY ONE would not transfer to whomever purchased the vessel at auction. Representatives of the United States Marshal Service, who conducted the auction, asked Mr. Doucette on at least one occasion to be quiet. Following Mr. Doucette's outburst, there were only two bids for the vessel. Plaintiff first bid $16,000, and then Andrew Todd made the final bid of $17,000.

Nunya purchased the QUALITY ONE in 1997 for $49,500. Mr. Doucette testified that repairs worth approximately $26,000 were made to the QUALITY ONE by Nunya. Nunya listed the QUALITY ONE with a broker on at

least two occasions, but a buyer was not found. Sometime in 1998, Nunya listed the QUALITY ONE with an asking price of $75,000. The following year, the vessel was listed again with an asking price of $50,000. Obviously, Nunya was never successful in finding a buyer for the QUALITY ONE. Betty Doucette, the president of Nunya, testified that she did not receive any offers higher than $40,000 to purchase the vessel.[2] Defendant also points to a marine survey prepared in 1997 for the purposes of procuring insurance which determined the market value of the QUALITY ONE to be between $44,250 and $52,250. Plaintiff challenges the accuracy of this valuation, suggesting that the survey is the result of a cursory inspection. Finally, there was conflicting testimony regarding the working condition of the vessel. While Mr. Doucette testified that the vessel was in fine working order, Ms. Doucette reluctantly acknowledged that the vessel was not able to participate in the shrimp fishery during the late fall of 1999. Further, Mr. Todd testified that his nephew had inspected the vessel when Nunya had it listed for sale and that the inspection revealed engine trouble.

The Court begins with Defendant's contention that the fishing permits maintained by Nunya for the QUALITY ONE are not part of the *res* of the vessel but are, instead, the personal property of Nunya. Accordingly, Defendant

---

[2]The testimony on this point was muddled at best. Ms. Doucette was asked if she ever received an offer of $40,000 or more to purchase the QUALITY ONE. She testified that she had not. No further questions were asked, such that it is impossible to know if Ms. Doucette received an offer for $40,000, but rejected it, or if she never received a single offer to purchase the QUALITY ONE.

contends, the permits were not subject to Plaintiff's maritime liens and not subject to arrest by the United States Marshal Service. Finally, according to Defendant, the permits would not be transferred to any purchaser at a court-ordered auction. Plaintiff counters that the fishing permits are appurtenances to the vessel and, that under the principles of admiralty and maritime law, a maritime lien placed on a vessel applies to any appurtenances of that vessel as well. According to Plaintiff, when the vessel was seized and auctioned, both the seizure and the auction included the fishing permits.

Neither party has cited, nor has the Court uncovered, any authority that directly addresses whether or not a maritime lien reaches commercial fishing permits maintained for that vessel.[3] The absence of case law on this subject may result from the relatively recent development of limited access fisheries in which new permits are unavailable and existing

---

[3]In *Bank of America v. Pengwin,* 175 F.3d 1109 (9th Cir. 1999), a fishing vessel was auctioned with its fishing rights to satisfy maritime liens. The Court of Appeals for the Ninth Circuit affirmed the lower court's confirmation of the sale despite the failure to include in the notice of sale that the fishing rights were being auctioned along with the vessel. *Id.* at 1119. No dispute regarding the propriety of including the fishing rights in the auction -- apparently because it was determined that the fishing rights were subject to the liens as well -- was generated by that case. Accordingly, the Court does not rely on that case, except to note that its holding is in no way inconsistent with this Court's ultimate conclusion that a fishing permit is an appurtenance subject to a maritime lien.

permits are encumbered by ever-increasing limitations.[4] Historically, commercial fishing permits were available without limitation. Today, however, commercial fishing permits in some fisheries are so rare, and so limited, that the permits themselves are quite valuable. Stated another way, a fishing vessel without federal fishing permits is far less valuable than a similar boat with federal fishing permits.[5] Indeed, several of the witnesses at the evidentiary hearing testified that they would assign little or no value to the QUALITY ONE (aside, presumably, from a scrap value) if it were to be sold without its fishing permits.

The system of maritime liens benefits both creditors and debtors. Businesses may furnish all manner of goods and services to vessels on credit with the knowledge that the maritime lien system provides some protection for their interests. Given the transitory nature of the collateral, vessel owners would be hard pressed to obtain much-needed goods and services on credit in the absence of a maritime lien system,. A fundamental and long-standing principle of the maritime lien system is that all equipment -- or appurtenances -- aboard a vessel, as well as the vessel itself, are subject to

---

[4]For example, some federal fishing permits include "days at sea" limitations. A holder of such a permit may only be at sea, fishing a relatively small number of days each year. Otherwise, the vessel must either be fishing for other species or tied up at the dock.

[5]From the testimony at the evidentiary hearing, the Court understands that it is possible to transfer commercial fishing permits from one vessel to another. However, it is apparent that such a process is complicated and costly.

the lien regardless of ownership. *See SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1st Cir. 1972) (cement loading, bagging, and unloading equipment appurtenant to bulk cement carrier, and therefore subject to maritime lien). In other words, "equipment installed aboard a vessel, which become[s] an integral part of the vessel and are essential to its navigation and operation, [is] subject to the maritime liens upon the vessel regardless of who the actual owner may be." *United States v. F/V Sylvester F. Whalen,* 217 F. Supp. 916, 917 (D. Me. 1963) (fathometer and radar leased to vessel held subject to maritime lien despite reservation, in lease, of title in lessor).

The logic of the appurtenance rule is straightforward with respect to maritime suppliers who provide goods and services on credit.

> This rule . . . is predicated upon the principle that one extending credit to a ship has the right to assume that the entire vessel, including all of her equipment essential to her navigation or to the completion of the voyage upon which she is embarked, stands as security for the debt.

Stewart & Stevenson Services, Inc., v. M/V Chris Way MacMillan, 890 F. Supp. 552, 562 (N.D. Miss., 1995) (citing *The Hope,* 191 F. 243, 245 (D. Mass. 1911) (holding maritime lien applies to engine, noting that "repairs or supplies must obviously have been furnished upon the security of a complete gas screw launch, not upon the security of a mere hull devoid of motive power.")).

The question raised by this case -- and apparently not previously answered by the courts -- is whether fishing permits, like fathometers, radars, and engines, are appurtenances subject to maritime liens. At first blush, there is an obvious distinction, a fishing permit is an intangible right to fish, whereas typical appurtenances, like fishing nets and radar systems, are tangible property. However, there can be no doubt that a commercial fishing permit is as vital as the nets to the mission of a fishing vessel. Indeed, fishing permits are apparently more integral to the QUALITY ONE's future as a commercial fishing vessel than is the tangible equipment, because the permits, unlike the rest of the appurtenances, are extremely difficult to replace. There is no doubt that, in the era of limited entry fisheries, with respect to the QUALITY ONE, a commercial fishing permit is "an integral part of the vessel and [is] essential to its navigation and operation . . . ." *F/V Sylvester F. Whalen,* 217 Fed. Supp. at 917.

The Court is also satisfied that marine suppliers, such as Plaintiff, are well aware of the impact of limited entry regulation upon the local commercial fishing industry. Accordingly, suppliers realize that the value of a commercial fishing vessel is tied to the value of the vessel's permits. For example, in the current regulatory scheme, a marine supplier would be hesitant to extend credit to a fishing vessel that had no permits, given that obtaining permits is extremely difficult. From that, it follows that suppliers would be less likely to extend credit to commercial fishing vessels if the supplier knew that the lien created by the provision of goods or services did not attach to the vessel's fishing permits, just as the supplier would be hesitant to extend credit if the lien did not attach to the equipment on the vessel. Accordingly, adopting a rule by which a fishing permit is treated like any

other appurtenance is consistent with the underlying principle of the appurtenance rule -- that marine suppliers extend credit based on the security of the entire vessel as a going concern, rather than on the hull and cabin alone.[6] *Cf. The Hope,* 191 Fed. at 245. Therefore, the Court finds that commercial fishing permits are appurtenances equivalent to fishing nets and are subject to maritime liens.[7]

Having determined that the QUALITY ONE's fishing permits are appurtenances subject to the maritime liens, the Court turns to the original question raised by the Motion: whether or not to confirm the sale at auction of the QUALITY ONE. Unfortunately, an independent appraisal of the QUALITY ONE was not conducted prior to the auction. It is common practice to order an independent, confidential appraisal prior to sales such as this so that the Court has a benchmark to aide it in determining if the sale should be

---

[6]A contrary finding could have a serious impact on those engaged in commercial fishing. If this Court were to hold that fishing permits are not subject to maritime liens, marine suppliers could become hesitant to extend what is presumably much-needed credit in the form of goods and services to commercial fishing vessels, given that the value of such vessels without their permits is far less.

[7]Plaintiff has also offered provisions of the fishery management plan for the Northeastern United States, specifically 50 C.F.R. § 648.4, as authority for the proposition that a fishing permit transfers with the vessel at a court-ordered sale of the vessel to satisfy maritime liens. The Court finds that authority to be of little weight in this particular instance, and the Court, therefore, does not rest its ultimate conclusion on any portion of the management plan.

confirmed.[8] *See, e.g., Munro Drydock, Inc., v. M/V Heron,* 585 F.2d 13, 14 (1st Cir. 1978); *Maine Nat. Bank v. F/V Explorer,* 663 F. Supp. 462, 470 (D. Me.) *aff'd* 833 F.2d 375 (1st Cir. 1987); *Southern New England Production Credit Ass'n v. O/S My Marie,* 611 F. Supp. 757, 758-59 (D. Me. 1985). In the absence of an appraisal, the Court must look to other evidence in order to establish a fair market value for the QUALITY ONE. Determining a market value for any item is typically a speculative endeavor. Assigning a market value in this instance is particularly difficult given the conflicting evidence presented, as well as the fragile condition of the local commercial fishing industry. Based on the limited evidence provided, the Court determines the fair market value of the QUALITY ONE to be between $35,000 and $40,000. The Court bases this conclusion on Nunya's previous failed efforts to sell the QUALITY ONE for $75,000 and $50,000 and Nunya's failure to procure an offer to purchase the vessel in excess of $40,000. Furthermore, the Court is satisfied that, despite the repairs and improvements made by Nunya, the

---

[8]At the evidentiary hearing, the Court inquired of Plaintiff's counsel why an appraisal had not been requested. The response was unsatisfactory. Obviously, the Court would prefer to have an independent appraisal in this instance -- and in all future cases. An appraisal would have provided the Court with a much stronger foundation upon which to decide the Motion, and it likely would have obviated the need for an evidentiary hearing. But see Maine Nat'l Bank v. F/V Explorer, 663 F. Supp. at 470 (evidentiary hearing on motion to confirm sale required despite existence of court-ordered appraisal).

QUALITY ONE is not in full working order.[9] Having established a fair market value, the Court must now determine if the sale at auction for $17,000 should be confirmed.

In deciding whether or not to confirm a sale, the Court must balance the need to instill confidence in court-ordered sales with the need to protect the interests of the creditors and the debtors. *Munro Drydock, Inc.*, 585 F.2d at 14. In other words, the Court must not unnecessarily disturb the results of a fairly conducted auction unless the rights of the creditors and debtor are significantly infringed. To that end, a fairly conducted sale should be confirmed unless the sale price is grossly inadequate. *See id.* at 15. Stated another way, a fairly conducted auction should be confirmed unless "there is a substantial disparity between the highest bid and the appraised or fair market value, and there is a reasonable degree of probability that a substantially better price will be obtained by a resale." *See id.* (internal quotations omitted). Aside from simply comparing the fair market value with the highest bid, another often-used tool to demonstrate the gross inadequacy of a highest bid is to supply an upset bid -- essentially, a promise by a third party to bid up to a certain amount above the existing highest bid if a new sale is conducted.

The highest bid at the auction was $17,000. The Court has determined the fair market value of the QUALITY ONE to be between $35,000 and $40,000. Accordingly, the fair

---

[9]The Court bases this conclusion in large part on Ms. Doucette's testimony, albeit reluctant testimony, that the QUALITY ONE was not prepared to participate in the shrimp fishery during the late fall of 1999.

market value of the QUALITY ONE is approximately between two and two-and-one-half times the highest bid at auction. There is no magic formula for determining whether or not an auction bid is grossly inadequate. The case law on this subject reveals much disparity as to what is grossly inadequate. *See, e.g., Munro Drydock, Inc.*, 585 F.2d at 15-16 (district court abused discretion by confirming sale, without a requested hearing, where highest auction bid for vessel was $7,500, vessel appraised at $25,000 for scrap and $100,000 as drill ship, and upset bid of $50,000 proffered); *Wong Shing v. M/V Mardina Trader,* 564 F.2d 1183, 1188-89 (5th cir. 1977) (district court properly confirmed auction bid of $610,000 despite evidence of an upset bid of twice that amount, and evidence of a fair market value three times the auction bid); *Ghezzi v. Foss Launch & Tug Co.*, 321 F.2d 421, 425 (9th Cir. 1963) (district court did not abuse discretion by confirming auction bid of $41,000 despite upset bid of $50,000 in the absence of evidence concerning fair market value); *Maine Nat'l Bank,* 663 F. Supp. at 470 (evidentiary hearing required before confirmation of sale where court-ordered appraisal is more than twice the amount of the highest auction bid); *Southern New England Production Credit Ass'n,* 611 F. Supp. at 759-60 (motion to confirm sale denied where court ordered appraisal was "significantly more than twice the amount" of the highest auction bid and where only two bidders attended auction); *C.I.T. Corp. v. Oil Screw Frank T. Shearman,* 343 F. Supp. 1283 (E.D. Va. 1971) (given the circumstances, $1,000 bid on vessel valued at $50,000 not grossly inadequate) *aff'd sub nom Golden v. Oil Screw Frank T. Shearman,* 455 F.2d 133 (4th Cir. 1972). An appraised value of between two and two-and-one-half times the highest bid may demonstrate that this bid is inadequate, but the Court should order a new auction only if the bid is

grossly inadequate. Further, it is well established that, given the inherent circumstances of a forced sale, a foreclosure sale is not expected to generate a price equal to or even near the market value of a piece of property. *Cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38, 114 S. Ct. 1757 (1994).

Consideration of factors beyond merely the fair market value and the highest bid reveals further support for the conclusion that the bid, while perhaps inadequate, is not grossly inadequate. First, Defendant has not produced an upset bid, or otherwise offered evidence to indicate that a new sale will produce a higher bid. Producing an upset bid is a common means to prove an auction has produced a grossly inadequate price. *See, e.g., Munro Drydock, Inc.*, 585 F.2d at 14-15. The failure of Defendant to procure an upset bid supports a finding that the auction bid is not grossly inadequate.[10] Second, the auction was apparently well publicized and well attended. *Cf., Southern New England Production Credit Ass'n,* 611 F. Supp. at 759-60 (motion to confirm sale denied in part because only two bidders -- one being the creditor -- were present at auction). Finally, to the extent that potential buyers were reluctant to bid as a result of Mr. Doucette's comments at the auction, the Court is unwilling to consider that a basis to order a new sale. To the extent that Mr. Doucette, plainly an agent of Defendant

---

[10]The standard speaks of a gross inadequacy, rather than a simply inadequacy. The Court takes the modifier gross to be meaningful in this context. If a bid of $17,000 were grossly inadequate for the QUALITY ONE, it would follow that Defendant should be able to find a buyer willing to offer an upset bid.

Nunya,[11] may have reduced the amount of the final bid, Defendant will not benefit from its agent's misconduct by achieving a second auction that may generate a higher bid.[12]

Taking all of these factors into consideration, the Court finds that the $17,000 bid is not grossly inadequate. Additionally the Court is not satisfied that "there is a reasonable degree of probability that a substantially better price will be obtained by a resale." *Munro Drydock, Inc.*, 585 F.2d at 15. Balancing the need to instill confidence in court-ordered auctions with the need to protect the interests of the

---

[11]Although Mr. Doucette is apparently neither an officer nor a shareholder of Nunya, the record is replete with evidence demonstrating that Mr. Doucette acted as Nunya's agent with respect to the QUALITY ONE. In addition to being the vessel's captain, Mr. Doucette testified that he conducted and supervised numerous repairs to the vessel. The verified complaint reveals that Mr. Doucette procured supplies for the vessel on credit. Complaint at P 11. Finally, a review of the marine survey for the QUALITY ONE prepared by an insurance company reveals that it was requested by, and prepared for, Mr. Doucette.

[12]To the extent that Mr. Doucette's actions may have undermined confidence in court-ordered auctions, the Court cannot allow Mr. Doucette or Nunya to benefit in any way from this inexcusable conduct. "It is important, in the ordinary case, to honor the expectations of those bidding at the sale." Munro Drydock, Inc., 585 F.2d at 16.

creditors and the debtor, the Court believes the best course of action is to confirm the sale without further delay.[13]

Accordingly, the Court **ORDERS** that Plaintiff's Motion for Order Confirming Sale be, and it is hereby, **GRANTED**. Further, the Court **ORDERS** that the Sale of the F/V QUALITY ONE be, and it is hereby, **CONFIRMED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 14th day of June, 2000.

[13]By the terms of the auction, the high bidder was required to pay the full price to the Court on the day of the auction. As a result the bidder has had $17,000 of capital tied up for approximately three months, without having access to the vessel. The Court has no doubt that such a delay has the potential to decrease the confidence with which bidders will participate in future court auctions. The Court wishes to minimize any such damage by confirming this sale as soon as possible. Cf. Munro Drydock, Inc., 585 F.2d at 16 ("It is important, in the ordinary case, to honor the expectations of those bidding at the sale.").

Supreme Court, U.S.
FILED
AUG 4 2001
OFFICE OF THE CLERK

No. 01-19

In The

Supreme Court of the United States

F/V QUALITY ONE, IN REM;
NUNYA, INC., IN PERSONAM,

Petitioners,

v.

GOWEN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record: GEOFFREY K. CUMMINGS, ESQ.

Counsel for Respondent: MICHAEL KAPLAN, ESQ.
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLC
One City Center
P.O. Box 9546
Portland, ME 04112-9546
207-791-3000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Reasons for Denying the Writ 2

Conclusion 9

TABLE OF AUTHORITIES

Page

U.S. Cases

American Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36 (Ct. Cl. 2001) 5

Bank of America, NT & SA v. Pengwin, 75 F.3d 1109 (9th Cir. 1999) 7

Conti v. United States, 48 Fed. Cl. 532 (Ct. Claims 2001) 4

Gowen, Inc. v. F/V Quality One, 2000 A.M.C. 2225, 2000 WL 893402 (D. Me. 2000) 2, 5, 7

Gowen, Inc. v. F/V Quality One, 224 F.3d 64 (1st Cir. 2001) 2, 3

Racal Survey USA, Inc. v. M/V Count Fleet, 231 F.3d 183 (5th Cir. 2000) 8

Statutes and Rules

Federal Rule

Federal Rule of Civil Procedure C(6) 1

Code of Federal Regulations

50 C.F.R. Parts 600 *et seq.* 6

50 C.F.R. § 648.4(a)(1), § 648.4(a)(1)(D) 5, 7

U.S. Code

Magnuson-Stevens Act, 16 U.S.C. § 1855(h)(3),(4) ... 3, 4

Other Authorities

Gilmore & Black, The Law of Admiralty (2d Ed. 1975) at 586 3

S. Rep. No. 105-275, at 25-26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4098-99 4

RESPONDENT GOWEN INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gowen, Inc., the Plaintiff below and Respondent here, respectfully requests that this Court decline to issue a Writ of Certiorari to review the judgment entered in this case by United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Although Gowen agrees generally with the descriptions of the proceedings below set forth in the statement of the case presented by the Petitioners, Petition at 1-2 (but not the expository material in Sections A,B,C, *id.* at 2-5), Gowen believes certain additional factors are important. Neither defendant *in rem* F/V Quality One nor defendant *in personam* Nunya, Inc., filed an answer. Nunya failed to file a claim to the vessel as required by Federal Rule of Civil Procedure C(6). Nunya was defaulted (default judgment) on liability. The warrant of arrest issued with respect to the F/V Quality One specifically arrested the vessel with her appurtenances.[1] When Gowen moved for interlocutory sale of the vessel, it specifically requested that the vessel be sold with her

[1] Thus, Petitioners' insinuation, Petition at 4-5, that the fishing permits were not arrested because they are not individually identified in the warrant of arrest is without merit. There is no authority requiring that each appurtenance be individually listed in the Complaint or in the warrant.

federal fishing permits as appurtenances. Neither petitioner contested the motion for interlocutory sale. The district court ordered the interlocutory sale of the vessel with the permits.

In addition, evidence was presented to the district court, and the court found, that

> [t]oday, however, commercial fishing permits in some fisheries are so rare, and so limited, that the permits themselves are quite valuable. Stated another way, a fishing vessel without federal fishing permits is far less valuable than a similar boat with federal fishing permits. Indeed, several of the witnesses at the evidentiary hearing testified that they would assign little or no value to the Quality One (aside, presumably, from a scrap value) if it were to be sold without its fishing permits.

Gowen, Inc. v. F/V Quality One, 2000 A.M.C. 2225, 2000 WL 893402 at *2 (D. Me. 2000). Similarly, the First Circuit noted that "testimony during the district court hearing made clear that the F/V Quality One's permits contributed substantially to the vessel's value. . . . " *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001). For present purposes, what matters is that vessels like the F/V Quality One are primarily valuable because of their permits.

REASONS FOR DENYING THE WRIT

Gowen agrees that the issue decided by the Courts below was one of first impression, but disagrees that this case meets the standard of Supreme Court Rule 10 for

granting the writ. The Petitioners present the usual parade of horribles, some of which evaporate completely upon examination, and some of which are likely never to materialize. Neither the district court nor the First Circuit reached these issues, appropriately, because they were not before those courts, nor are the hypothetical factual circumstances alluded to by the Petitioners before this Court. In other words, precisely because this is a case of first impression, this Court should decline to review it before determining whether, in fact, the sorts of problems complained of by the Petitioners, or other problems, develop as other lower courts grapple with the same issue.

Petitioners assert, at Petition p. 6, that the First Circuit's decision makes no mention of how the Magnuson-Stevens Act's "exclusive registry," *see* 16 U.S.C. § 1855(h), and maritime lien law will interact once the (belated) registry required by the Act is actually established. Actually, the First Circuit did allude to this issue, noting that the Magnuson-Stevens Act only establishes a registry for purposes of *perfecting* security interests with respect to third parties without notice of such security interests. 244 F.3d at 69-70 (*citing* 16 U.S.C. § 1855(h)(3), (4)). In this case, there were no such third parties, and nothing in the Magnuson-Stevens Act requires perfection as between the creditor and the vessel, which is the situation presented by this case. Since, as between the debtors and the maritime lien creditor, no filing would be required even if the Magnuson-Stevens Act registry applies to maritime liens, *compare* 16 U.S.C. § 1855(h)(4) (defining "security interest" to include "liens" but omitting mention of maritime liens) *with* Gilmore & Black, *The Law of Admiralty* (2d Ed.

1975) at 586 ("A maritime lien, so-called, is not a lien at all in the common law sense of the term"), if the Magnuson-Stevens Act registry had existed at the time of the proceedings below, it would have had no effect whatsoever in this matter.

It is noteworthy that, despite the Petitioner's assertions that fishing permits are personal licenses of the owner and therefore not subject to maritime liens, Petition at 5, 8-9, Congress stated quite plainly when it established the central registry for security interests in fishing permits that "[m]any participants in limited access fisheries use permits as loan collateral to finance the acquisition of the permit itself or to otherwise finance their operations." S. Rep. No. 105-275, at 25-26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4098-99. If security interests may be granted and enforced in such permits (which is the reason for being of the registry), it is apparent that the nature of the permits is such that liens may attach. If permits can be lienied, why shouldn't maritime liens attach? Petitioners assert that permits are more closely analogous to a revocable license and that there is no property interest that is granted with the permits. Petition at 8. This view of the permits is belied by the Magnuson-Stevens Act itself, which specifically recognizes that security interests (which are interests in property) attach to such permits and creates a registry for perfecting such liens against the claims of others.

Conti v. United States, 48 Fed. Cl. 532 (Ct. Cl. 2001), relied on by the Petitioners, is not to the contrary. *Conti* engaged in an extensive analysis of limited access fishing permits to determine whether a change in the fishing

methods allowed to the holder of a limited access fisheries permit had effected a taking. The plaintiff was not deprived of his permit. The court held in that context that such permits were "not intended to create a property right within the meaning of the Fifth Amendment." *Id.* at 538. *But see American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 48 n.4 (Ct. Cl. 2001) (legislation precluding owner from using vessel to fish and resulting in revocation of permit effected a taking, distinguishing *Conti* and noting that Conti's permit had not been revoked).

That fishing permits are distinguishable from personal licenses is also borne out by the undisputed fact that the permits may be sold with the vessel, 50 C.F.R. § 648.4(a)(1)(D), or (with some difficulty) without it. *See Gowen, supra*, 2000 WL 893402 at * 2 n.5. Indeed, the regulations creating the permits at issue state that the permits are "presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred. . . . " 50 C.F.R. § 648.4(a)(1)(D). Although neither lower court relied on the regulations for its ruling, Gowen submits that the arrest and interlocutory sale of the vessel fits comfortably within the phrase "sold or otherwise transferred."

Petitioners assert that because the fishing permits are issued on a regional basis and/or are species specific, the maritime doctrine of uniformity will be compromised, allegedly because fishing permits will constitute appurtenances in some regions but not in others. Petition at 7. Petitioners are mistaken. If permits are easier or cheaper to obtain in one region than another, they may have less value on the auction block, but their nature does not change, just as a vessel fitted out for shrimping in the

Gulf of Mexico might bring a lower price if seized and sold in Portland, Maine than it would if it were seized and sold in Galveston, Texas. If the federal fishing permits, all of which are creatures of a regulatory scheme, *see generally* 50 C.F.R. Parts 600 *et seq.*, are appurtenances, then they are appurtenances. If they are less valuable in one locale than another, that is a different issue.

Petitioners also question what will happen if a fishing vessel is lost and the permit transferred to a replacement vessel because, they assert, under traditional maritime lien law, the loss of the *res* extinguishes the lien. Petition, 7. Petitioners worry that if the permit for the lost vessel were transferred to a different vessel, as sometimes may be permissible under the applicable regulations, the liens claimed on the lost vessel could follow the permit to the different vessel.

The Petitioners mistake the difference between the vessel itself and an appurtenance to the vessel. Appurtenances to the vessel are seized with the vessel itself so long as they are appurtenances. Petitioners fail to cite any case that shows that, for instance, if a radar unit is on a vessel at the time the lien attaches, and is later sold to another vessel, the radar unit on the second vessel can be arrested when the first vessel is seized. Rather, absent fraud, the radar unit becomes an appurtenance of the second vessel when it is placed on it.

Another hypothetical scenario imagined by the Petitioner is service of process upon the National Marine Fisheries Service to, presumably, arrest the permits when the vessel itself has not been seized. Again, the Petitioners mistake the First Circuit's ruling. The First Circuit

did not rule that the permits are intangible property that may be seized independently of the vessel under the federal rules. The First Circuit held that the permits are appurtenances of the vessel that are seized when the vessel itself is seized. Since, except under limited and temporary circumstances, the permits are always associated with a vessel, *see* 50 C.F.R. § 648.4(a)(1) ("vessel must have been issued . . . a valid permit"), § 648. 4(a)(1)(D), Petitioners' hypothetical scenario is simply not an issue. Again, it must be noted that the maritime lien in this case arose against a vessel. Petitioners have demonstrated no scenario or authority under which a *maritime* lien could attach to a permit independent of the vessel to which it is issued.

It is true that, before this case, there is no authority holding that fishing permits are subject to arrest as appurtenances of the vessel. Older cases cited by the petitioners may establish the parameters of maritime lien law but do not mention permits because, when those cases were decided, there were no such permits. Things have changed. Now, as the district court observed, the permits are as critical to the ability of fishing boats to fish as are the nets and other gear. The commercial mission of the vessel and its value are inextricably linked to the permits, and, as the district court observed, a ruling that maritime liens do *not* attach to the permits as appurtenances will make it considerably less likely that fishermen will be able to obtain much needed credit for repairs and gear. *Gowen*, 2000 WL 893402 at *3.

That the permits have value is not disputed. Indeed, in *Bank of America, NT & SA v. Pengwin*, 175 F.3d 1109 (9th Cir. 1999), although apparently no parties contested that

the permits were subject to arrest for maritime liens, *id.* at 1111-12, the parties did dispute whether the fact that the vessel would be sold with her permits must be advertised in the auction notice, presumably because the failure to do so brought a lower purchase price for the vessel.

In any event, despite the Petitioner's assertion that *Racal Survey USA, Inc. v. M/V Count Fleet*, 231 F.3d 183 (5th Cir. 2000),[2] holds that maritime lien law is not to be extended, Petition at 6-7, courts have extended the concept of appurtenances to new types of gear and property when the conditions of maritime commerce have changed. If Petitioner's argument that the appurtenances subject to maritime liens are frozen in the mists of time were valid, only sails, nets and blocks and tackle could be seized and sold. As the First Circuit noted, "from the standpoint of policy, no obvious arguments exist against treating the permits as subject to lien. We have assumed, as appellants assert, that the permits could in some circumstances be severed from the vessel upon its sale and be retained by its old owner. The courts have repeatedly upheld maritime liens upon 'severable' equipment, including, surprisingly enough, equipment merely *leased* to the owner." 244 F.3d at 69 (emphasis in original, citations omitted).

---

[2] Racal held that maritime lien law could not be extended to allow a lien to attach on behalf of a ship owner to property of a charterer other than cargo, a quite different issue. 231 F.3d. at 192

CONCLUSION

The First Circuit did not err. This Court should deny the Petition.

Respectfully submitted,

GEOFFREY C. CUMMINGS, ESQ.
Counsel of Record

MICHAEL KAPLAN, ESQ.
Counsel for Respondent

Preti Flaherty Beliveau
Pachios & Haley, LLC
One City Center
P.O. Box 9546
Portland, ME 04112-9546
(207) 791-3000